IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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GUN OWNERS OF AMERICA, INC.,
GUN OWNERS FOUNDATION,
VIRGINIA CITIZENS DEFENSE LEAGUE,
MATT WATKINS, TIM HARMSEN, and
RACHEL MALONE,

Plaintiffs,

v. CASE NO: 1:18-CV-1429

MATTHEW WHITAKER, in his official
capacity as Acting Attorney
General of the United States,
U.S. DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES, and
THOMAS E. BRANDON, in his
official capacity as Acting
Director, Bureau of Alcohol,
Tobacco, Firearms, and Explosives,

Defendants.

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HEARING on PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

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BEFORE: THE HONORABLE PAUL L. MALONEY
United States District Judge
Kalamazoo, Michigan
March 6, 2019

APPEARANCES:

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Kalamazoo, Michigan

March 6, 2019

at approximately 9:10 a.m.

PROCEEDINGS

09:10:18 THE COURT: This is File Number 18-1249; Gun Owners of America, Incorporated, et al. vs. The Bureau of Alcohol, Tobacco, Firearms and Explosives, et al.

This matter is before the Court on plaintiffs' motion for a preliminary injunction, which is ECF Number 9.

09:10:42 The record should reflect that Attorneys Olson and Morgan represent the plaintiffs. Attorneys Soskin and Glover represent the defendants.

The Court is ready to proceed. Mr. Olson, you may proceed, sir.

09:10:55 MR. OLSON: Yes, sir. Good morning, your Honor.

THE COURT: Good morning, sir.

MR. OLSON: We are, as the Court is aware, here to -- for the Court to decide whether 20 days from today an estimated 500,000 Americans, if not many more, are going to

09:11:19 be required to destroy or surrender property that they have lawfully owned and the ATF for 10 to 15 years has stated is perfectly lawful to own, and now has suddenly decided constitutes a machinegun under federal law. And, your Honor, I believe that there are two important reasons here

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preliminary injunction, but actually require it in this case.

The first one is it's been our position since the filing of our Complaint that the federal statute defining a machinegun is clear and unambiguous, and the government actually agrees. If you look at final rule, I'm looking at Page 66527 of the Federal Register, they say even if the statute is unambiguous -- and they say this two or three times, so they are -- they clearly believe the statute is unambiguous -- and they say even if it's not, and they make their other argument, but and I think that sort of forecloses everything else because the Supreme Court has held, and I'm reading from Connecticut National Bank vs. Tremain, this is Justice Thomas speaking, he says, "When the words of a statute are unambiguous, the judicial inquiry is complete." The Ninth Circuit in TRW Rifle, it's in our reply brief, they say, "If the statute is unambiguous, courts simply follow the standard course of applying the definition to the facts."

ATF does not want this Court, your Honor, to apply the definition to the facts because as ATF admits, and this is their words, "Absent the revised definition, ATF could not restrict bump stocks." And one of the reasons that that is the case is because bump stocks do not fire more than one round by a single function of the trigger, and that's a

statutory term, and we have made that argument a half dozen times and it has never been contested by the government, your Honor. And again, using their words, the only way to get bump stocks to fall within the statute is to "expand the definition to include language that would then cover bump stocks." Of course, the Supreme Court has held, we've cited this case, the Digital Realty Trust case in our brief. They cite, the definition -- "An unambiguous definition precludes the agency from more expansively interpreting the term." And that's honestly what they admit they are doing here. They are expanding the definition to include bump stocks. And if the definition, if your Honor finds the definition to be ambiguous, then I think that raises questions whether there is a void for vagueness argument there then. It's not clear what statutes a machinegun, and Congress has then failed its duty to clearly define what constitutes a crime.

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THE COURT: Well, there have been multiple people prosecuted under the statute criminally, correct, and those convictions were upheld, right?

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MR. OLSON: Certainly. I think--

THE COURT: So the statute, if it meets the threshold of criminal prosecutions, doesn't that implicate that argument here?

MR. OLSON: I think that's been based on the assumption that since 1934 the statute has been unambiguous,

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and Courts have had no problem interpreting it and implying it in cases. Suddenly now in 2018, it's ambiguous according to the government. They have never seen fit to change the definition in all of these years until ordered to do so
09:14:48 essentially by President Trump, and to reach a particular conclusion, which their briefing admits that they set out with this particular intent and purpose in mind and then crafted a regulation that would meet the intended result.

What ATF --

09:15:06 THE COURT: What rule of statutory construction do you rely on to assert that the statute is unambiguous? I don't think that's clear from your briefing.

MR. OLSON: I guess that automatically at least we would argue the plain meaning, single function of the
09:15:26 trigger as we argued you would -- we argued that you ordinarily would use the plain meaning, but in this case, it's clear from that language and, as the government points out, Congress didn't use the ordinary language, they didn't use pulling the trigger, which is what people ordinarily
09:15:42 would talk about when discussing shooting a gun. They used function of the trigger, and I think there is a reason for that, and it's very clear that Congress meant this term to have a technical sort of scientific definition, and that's what ATF says that their specialty is, is in technical
09:15:58 analysis, not in what they have now shifted the statute to.

Single pull of the trigger looks at the subjective intent of the shooter and what the shooter is doing, how the shooter is interacting with the gun. And we get into intent and subconscious thinking, and certainly the ATF is no expert at any of that, your Honor.

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THE COURT: Go ahead. Thank you.

MR. OLSON: In this case, it's interesting to look, because ATF doesn't ever say we are defining machinegun, because Congress has defined a machinegun, it's given a multi-part fairly lengthy definition. So what ATF says they're doing, and again, their words, they say the terms contained in the definition are undefined. Of course, they are undefined, because Congress doesn't define definitions and then define the definitions of the definitions, and it just goes on, but that's what ATF purports to do here. And that's the only way you would get to the result they want is you take machinegun, and for example, one of the elements is that it fires automatically, and that is the definition. But now they want to define automatically as a self-acting or self-regulating mechanism, and then we talk about a mechanism. So in their brief in opposition on Page 21, we actually get into a discussion and argument about what a mechanism is. And so now we are three iterations away from what the statute says.

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When it comes to the other elements, the single

function, they have defined it for a number of years as a single pull of the trigger, not a single function of the trigger. But now in the final rule, they move from single pull of the trigger to single pull of the trigger and
09:17:35 analogous motions, because they realize there is a problem with single pull and it doesn't encompass everything, all the ways a trigger could be activated. And now in their briefing, they have a whole list of analogous motions that they want to be covered under single pull. And as we point
09:17:51 out in our briefing, if you just go with single function, that covers all of the ways a trigger could be activated, covers pulls and pushes and switches and paddles. And I think Congress recognized that. Clearly they had machineguns back in 1934 that were activated by paddles or
09:18:08 different things that weren't a typical trigger, and so Congress used that terminology so you would look at the trigger and look at its function.

So we keep ATF, in order to get where they want, they keep getting further and further away from what the
09:18:24 statute and what the definition in the statute actually says, and it sort of begs the question how many iterations you need to have of defining definitions of definitions, and it seems like the answer is as many as it takes until bump stocks are machineguns, your Honor.

09:18:38 One of the issues that I wanted to raise was

something that the Court's no doubt familiar with, the government's recent filing just last week, the Notice of Supplemental Authority discussing Judge Friedrich's opinion in DC and the issue of deference. And in our initial briefing, we had argued there is no Chevron deference in a determination like this.

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THE COURT: You don't get Chevron deference if the statute is--

MR. OLSON: Certainly, certainly. Even if the Court decided the statute were ambiguous, ATF has now disclaimed any deference at all. They say -- They cite the Apel decision, the 2014 Supreme Court Apel decision, and there the Court says we have never held that the government's reading of a criminal statute is entitled to any deference. And certainly that means Chevron deference, your Honor. I think the government admits that. But the other thing I think that that forecloses is --

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THE COURT: Well, wasn't the critical word you just spoke, the criminal context or criminal --

MR. OLSON: Criminal statute.

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THE COURT: -- as opposed to this is something different, right?

MR. OLSON: This case, your Honor?

THE COURT: Well, this is not a criminal prosecution. There are certain rules of statutory

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construction as it relates to criminal statutes which the context is totally different here, right?

MR. OLSON: This is not a criminal prosecution, your Honor, but this is a criminal statute that was enacted, reenacted as Title 2 of the Gun Control Act in 1968. It's interspersed and intermingled. The gun Control Act relies on the NFA definition. Just because we are not here in a criminal matter doesn't mean this should be a different rule, I would think for this case, and then if six months down the line ATF chooses to prosecute someone, the statute has to mean the same thing in both contexts, I would think. And the government has admitted that they are due no deference here.

And so I think the important thing is that, you know, if Chevron is out, that also means that 706 deference is out under the APA, your Honor, because that discusses arbitrary and capricious and those sorts of concepts. And as Judge Friedrich mentioned in her DC opinion, and every other case that I've read on this, it says that Chevron deference and 706(a) -- or 706 deference, they overlap, the analysis is basically the same. Because in Chevron you're asking whether something is arbitrary and capricious, and in 706 you're asking if something is arbitrary and capricious. So the deference, in Apel says, any deference, it doesn't say Chevron deference. We have held that the government's

reading of criminal statute is not entitled to any deference. I would argue that forecloses 706 deference as well, that it's not just as the government argues, that they had a reasonable interpretation of the statute, that there
09:21:36 was nothing foreclosing their argument or anything like that, that it's actually a function for this Court to itself determine what the statute actually means, not so long as ATF has a reasonable interpretation of the statute, we'll go with that, if that makes sense.

09:21:56 As we cited in Abramski, the Abramski decision which was decided a few months of after Apel, the Court went even further and they were actually dealing with the case where ATF was a party and they were dealing with an ATF interpretation of the statute, and they said, "ATF's old
09:22:12 position is no more relevant than its current one, which is to say not relevant at all. When the government interprets a criminal statute too broadly, as it sometimes does, or too narrowly, as ATF used in that case, a Court has an obligation to correct its error." So I would say that even
09:22:27 if this Court found the statute to be ambiguous, that it's almost a de novo review of what the statute means, and there is no deference to the government any more than there is deference to the plaintiffs. It's all just the power to persuade of the briefs.

09:22:43 Your Honor, there is one other thing that I wanted

to discuss that we mentioned briefly in our opening brief, and it came up in both oral arguments in DC in front of Judge Friedrich, and that was ATF's, their application of the final rule to rubber bands. And if you look at Page 66551 of the final rule, they say that, "Individuals wishing to replicate the effects of bump stock type devices could also use rubber bands, belt loops or otherwise train their trigger finger to fire more rapidly, this would be their alternative to using bump stock type devices." And that has not always been ATF's position. They have had opinion letters over the years where they have said if a rubber band is affixed to a rifle in a certain way, that it might make it a machinegun. And so they are basically counseling people to tread lightly here because we haven't determined this, but it could be. But in the final rule, your Honor, the ATF puts its rubber stamp on rubber bands. They say go to town.

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THE COURT: Rubber stamp on rubber bands. Go ahead.

MR. OLSON: Sorry.

So you look at a rubber band, your Honor, and you look at the -- I would obviously argue that under the statute, a rubber band hooked around the trigger of an AR-15 wrapped around the front of the magazine well and back around the trigger that provides some forward assistance for

the trigger reset, and then when coupled with recoil of the firearm, those two forces together are enough to articulate the trigger, to reset the trigger, and then the shooter would press the trigger and fire another round. Under the statute, the way it's written, I would say it's still not a machinegun, because it's still firing one round for every mechanical function of the trigger. You have a trigger break and a trigger reset, one function of the trigger. But even if you look at ATF's definition that they have constructed and you apply it to a rubber band, a rubber band, it fires, it works automatically, it elongates and it compresses, and doing that is certainly harnessing recoil energy, and it's certainly self-acting and self-regulating. These are all the concepts that ATF throws around in its final rule.

And if you -- if just for the sake of argument we go with single pull of the trigger, when you're firing an AR-15, say, with a rubber band, the trigger finger never physically separates from that trigger, so it could be understood to be a single pull of the trigger. So a rubber band, your Honor, meets every single one of the criteria that ATF itself has established for a machinegun, yet here they say use your rubber bands, don't use your bump stock. A bump stock fits none of the criteria that we've argued under ATF's constructive definition, and yet they're saying

bump stocks are machineguns.

One of the other things that we have pointed to is semi-automatic firearms themselves, that there is a danger here that, left unchecked and given this new authority to
09:26:09 expand the definition and thus expand the statute that a future administration, a future ATF could come in and apply this definition of machineguns to semi-automatic firearms, which everyone hopefully knows are completely different things. But under the way they have written this final
09:26:28 regulation is, you know, a semiautomatic firearm, when you pull the trigger and discharge a round, you set into motion a series of events. The bolt or slide comes to the rear, the spent casing is ejected, the bolt with a spring assisted goes back forward, strips another round off, and puts it
09:26:47 into the chamber, and all the trigger components reset. Your Honor, all of that happens automatically once you have a trigger break. And all of that happens, it's a self-acting, self-regulating mechanism, and it all happens by harnessing the recoil energy of the fired shot.

09:27:05 And what is also interesting is in basic shooting instruction, and when you get into this a little bit, one of the things that shooters are taught is that when you're firing a semi-automatic multiple rounds, you have trigger slack and then you get to sort of a wall, and you have a
09:27:24 trigger break, where there would be a 3, 4 or 5 whatever

poundage, it is necessary to then discharge the trigger. When that happens, the novice shooter, the instinct is to have their finger jump back off the trigger and lose contact with the trigger, but shooters are taught to just release the trigger enough to allow the trigger to reset. So if you have that slack and that take-up of the trigger, you don't let off, you don't release all of your pressure on the trigger, so you work in this very small space of trigger break, trigger reset, trigger break, trigger reset, so I would clearly argue against it in such a case, but I could see a scenario where, in the future, ATF could say that's a single pull of the trigger, because your finger never leaves the trigger and it's constantly exerting force on that trigger. So in that sense, once again, bump stocks fit none of their criteria, and semi-automatics, at least the argument could be made that fit every single one of their criteria, and that's a very dangerous road to go down to adopt a regulation that could be used in the future to ban semi-automatic firearms as a class.

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THE COURT: ATF has been consistent since 2006 on the issue of single pull, right?

MR. OLSON: With the Akins accelerator, yes, your Honor. Well, I would say they've been consistent on single pull, but now they have moved from single pull to single pull and analogous motion. So now they wish to change that

further. The Court in Akins never upheld the additional language, never looked at that, never realized that when you move from single function to single pull, and then there's other ways to pull a trigger, that that creates a whole host of problems that you then have to fix. So that's one of the two problems we see with Akins, your Honor. The other being, if you look at Akins, and I'm reading on Page -- I'm not seeing a page cite here that's easily determinable, but it says, under the APA, "We defer to the agency unless it acts arbitrary and capriciously on the other elements." So they are saying we are giving deference to the agency. Under Akins and Abramski -- Akins was in 2009, your Honor. I'm sorry, a lot of cases that begin with A here. Under Apel and Abramski, I think that's foreclosed any sort of deference. I actually think Akins has not been overruled, but the basis for the decision has been overruled, your Honor, the deference. I don't even think that the Eleventh Circuit's opinion still governs in the Eleventh Circuit after those two cases.

Your Honor, if you have any questions, I would be happy to try to address them. I don't know that I have anything further at this time.

THE COURT: All right. Thank you. I'll come back to you, I'm sure.

Mr. Soskin, go ahead, sir.

MR. SOSKIN: Good morning, your Honor.

THE COURT: Morning.

MR. SOSKIN: Thank you for having us out in defense of the Department of Justice's bump stock rule. Today I am joined by Mr. Glover who will be addressing issues including the preliminary injunction factors and the department's change of position as far as this final rule. I'll be addressing the rules, interpretations and applications to the bump stock.

09:30:50 And before I go further, I would just like to thank the local U.S. Attorney's Office, which was immensely helpful in this process. Ryan Cobb couldn't be here today, but he and his colleagues have been tremendous assistance and they would have done a fine job here had the wheels of

09:31:09 bureaucracy not dictated for me and Mr. Glover to come out ourselves.

So let's start here. What is --

THE COURT: We created this weather just for you, Mr. Soskin.

09:31:22 MR. SOSKIN: Well, thank you. It feels just like home. I'm originally from South Bend.

THE COURT: Are you really?

MR. SOSKIN: And we had, you know, plenty of surprise lake effect days, so.

09:31:31 THE COURT: Okay. Did you go to Notre Dame?

MR. SOSKIN: I did not. I always thought I would go to Notre Dame, but ended up going to school out of state.

THE COURT: Where did you go to school?

MR. SOSKIN: Williams College in Massachusetts. Also plenty of cold weather and snow there.

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THE COURT: Oh, yes, absolutely.

MR. SOSKIN: So what is a bump stock in practical terms? People use them to be able to shoot faster. It lets, as various videos that you can find on YouTube will demonstrate, lets a shooter of ordinary skill fire a semi-automatic rifle like you might buy at Wal-Mart or Cabela's almost as fast as the world's fastest shooter, but without all of the training and experience and difficulty required to achieve that level. This is a case about whether the Department of Justice's rule recognizing that bump stocks are machineguns is not arbitrary, capricious, in conflict with the statute or based on factors that Congress did not intend in its three components. One, the definition of single function of the trigger as single pull of the trigger, as an ATF did as early as 2006 and courts have subsequently upheld. Two, interpreting the term automatically to mean as the result of a self-acting or self-regulating mechanism that includes human input as a part. And three, applying these definitions to a bump stock type device to conclude a bump stock is a machinegun

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consistent with how it is used. And because none of those three elements of the final rule are arbitrary and capricious, plaintiffs cannot establish a substantial likelihood of success and are not entitled to their preliminary injunction.

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Let's start by looking at the text of the statute. What is it that we are interpreting here? In the National Firearms Act, Congress defined a machinegun as any weapon which shoots, is designed to shoot or can be readily restored to shoot, automatically more than one shot without manual reloading by a single function of the trigger. And that's codified in Section 5845(b) of Title 26. That definition in turn was incorporated into the Gun Control Act and into the Firearm Owners Protection Act, which enacted 18 U.S.C. 19220, thereby making -- thereby prohibiting the possession of newly manufactured machineguns prospectively from that date. The first element--

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THE COURT: Is this statute ambiguous or not?

MR. SOSKIN: The statute is -- was unambiguous in its application until we had bump stocks, a new development, a new type of -- a new type of firearm implement to which the statute had been applied. So everyone understood what a machinegun -- that everything that was a machinegun was a machinegun until this question arose of how do we treat bump stocks. So you would have to say that at the present time

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where we live in a world with bump stocks, the statute is ambiguous as to its application to those devices.

THE COURT: What implication does that have for criminal prosecutions of individuals who, assuming the rule goes into effect and is, passes muster with the Appellate Courts, what implication does that position have vis-a-vis a criminal prosecution of someone under the statute?

MR. SOSKIN: Because the final rule now lays out a clarifying definition, that is sufficient in our view to close the ambiguity and permit possession of bump stocks to be prosecuted. There should be no effect on any conventional device that has always been understood to be a machinegun.

THE COURT: Well, the United States Attorney is not going to be able to rely on Chevron deference in a criminal case, right?

MR. SOSKIN: Well, that's right, your Honor, and we are not able to rely on Chevron deference here for the same reason, your Honor, and that's why we set that out in our Notice of Supplemental Authority. We are asking -- the final rule sets forth what must be the interpretation of a machinegun as it applies to bump stocks, otherwise -- otherwise there will obviously be the challenges that you are identifying for prosecution of those persons. We can't order people to surrender their bump stocks unless they are,

in fact, covered by the criminal prohibition in 9220.

THE COURT: Thank you.

MR. SOSKIN: So the subterms within the statute are left undefined, and contrary to my friend's presentation here, it is not unusual for Congress to promulgate a definition and then promulgate definitions of terms that are within that definition. If you look at the prohibition, for example, on felon -- what is commonly known as felons in possession of firearms, in 18 U.S.C. 922(g)(1), it relies on a definition that is set forth in I believe 921(a)(20), which in turn relies on the definition of several of those terms in there. And so it is not an extraordinary proposition for the government, where the statutory definition leaves certain terms undefined, to step in as it has done here and say here is the clarified, meaning here is a regulation defining further what those undefined terms mean. And the final rule says that a single function of the trigger is a single pull of the trigger and analogous motions. And that is not an arbitrary and capricious interpretation in light of the significant evidence that supports the appropriateness of this definition.

First, of course, is the decade of history of this regulatory interpretation. As plaintiff's counsel acknowledged, this is not something new that the department is applying for the first time in the final rule. To the

contrary, ATF began interpreting a single function of the trigger as a pull in 2006 in the context of the Akins accelerator device, one of the first bump stock type devices that ATF was asked to classify, and over which at first it made an error and classified it as not a machinegun, and then shortly thereafter reversed its position, classified it as a machinegun. That issue was litigated, and the District Court, the Middle District of Florida and the Eleventh Circuit, ultimately upheld the reclassification of the Akins device as a machinegun and relied on the interpretation of single function of the trigger as a single pull of the trigger.

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THE COURT: What is new here is pointed out by Mr. Olson is the analogous motions language. Could you help me with that?

MR. SOSKIN: So the analogous motions language was a logical outgrowth of the definition set forth in the proposed rule, and that reflects the agency's efforts to address the comments that were received in the course of publishing the notice of proposed rule making, receiving comments, and then promulgating a final rule. Many of those comments suggested that the interpretation of single function of the trigger, just as single pull of the trigger, may be inconsistent with the operation of some specific types of machineguns as recognized in -- as recognized in

courts. So for example, devices that operate based on a switch or I think my colleague, my friend was referencing a paddle, and so those are elements that are analogous, those are things that are analogous to a pull, and that should properly be included in the final rules definition.

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Where did ATF get the equation of single function to single pull from? Well, it came right from the Supreme Court's opinion in the Staples case, which in the very first footnote articulated the distinction that the Supreme Court was going to apply in that opinion between automatic and semi-automatic weapons, i.e., between machineguns and not machineguns. And Justice Thomas wrote, "As used here, the terms automatic and fully automatic refer to a weapon that fires repeatedly with a single pull of the trigger." And then he continued, "Such weapons are machineguns within the meaning of the act. We use the term semi-automatic to designate a weapon that fires only one shot with each pull of the trigger."

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And therein, the Supreme Court recognized that function and pull or single function and single pull of the trigger in this context were synonymous, and that is where in part the agency drew its 2006 re-- 2006 interpretation from. Again, in Akins, the District Court and the Eleventh Circuit affirmed this view.

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However, it's not just based on that, as our brief

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explained, understanding single function as single pull is also consistent with the ordinary meaning. And our brief has dictionary definitions for pull the trigger and function. Judge Friedrich's opinion in DC cited to the 1933 09:42:06 Oxford English dictionary definition that was at the time that the National Firearms Act was promulgated for function. And a function is the mode of action by which it fulfills -- something fulfills its purpose. Here I think we all understand that the way a machinegun operates is through the 09:42:28 shooter pulling the trigger, and that pull is a description of the way of the function by which a machinegun performs its purpose. And this has been adopted so widely, of course, that pull the trigger has derivative colloquial meanings. We think of pull the trigger as being what you do 09:42:49 to initiate a significant decision. You know, Ms. Smith, are you going to pull the trigger on that home purchase? Or Mr. Johnson, are you going to pull the trigger on your engagement proposal to Ms. Smith? That understanding that "pull the trigger" is how we initiate the firing of a 09:43:12 firearm, helps us make sense out of this definition.

Now, plaintiffs object that we have moved from the mechanics of the trigger to the finger, and that the finger is not in the statute. But function really is about the nature of the operation, and that is the finger as much as 09:43:35 it is the trigger. That's what is required to understand

cases like Fleischli, your Honor, which is the Seventh Circuit case the parties have cited about a minigun and whether a minigun operated by a switch can be conceived of as a -- is properly classified as a machinegun. The reason
09:43:56 is that it's the nature of the operation, the shooter's decision to initiate firing.

Automatically is the second element in which a definition is promulgated in the final rule. And the final rule defines automatically as meaning the result of a
09:44:18 self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger or a single pull of the trigger. And this, too, is not an arbitrary or capricious definition. In fact, it accords with the plain text, because it's drawn from a 1934
09:44:39 dictionary, again, at the time that the single function of the trigger definition was adopted. And that means having a -- and that definition highlights the importance that something automatic performs a required act at a particular point in an operation. And that's really important.
09:45:02 Something that is automatic doesn't have to automate the entire process, it needs to automate a step in the process. And here, the step that is being automated is the direction by the shooter of recoil in a useful direction, i.e., into helping reset the trigger and reengage the firearm to fire
09:45:28 another shot.

That is also consistent with past judicial interpretations, your Honor. For example, we've cited the Olofson case which describes how the discharge of a machinegun occurs as a self-acting mechanism set in motion by a single function of the trigger.

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Plaintiffs are concerned that the inclusion of a person in this process renders it non-automatic, but I think that objection is belied by a comparison of a bump stock to the kind of device that everyone here agrees is a machinegun, the type of machinegun that has always unambiguously been understood to be encompassed by the statute. If you compare a video of an individual firing a bump stock equipped rifle with an individual firing a conventional machinegun, what you will see is great similarities in the degree to which this is an automatic act and great similarities in the extent to which the shooter must employ manual measures to maintain control of the firearm, including the person as a component of the firing process does not defeat automaticity.

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The third element of the final rule is the application of that definition to bump stock devices. And again here I think it's helpful to return to the big picture. The incorporation of a bump stock into your ordinary semi-automatic rifle that tens of millions of Americans, if not a hundred million Americans own, and that

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can be purchased, unlike a post-1986 machinegun, which is illegal, can be purchased almost anywhere.

Did Congress intend for a device that allows a shooter to make a semi-automatic rifle function essentially as a machinegun to be exempted when it banned newly manufactured machineguns from private possession? No, it did not. As our brief explains, Congress was concerned about preventing the serious law enforcement problems that would develop if machineguns continued to be promulgated -- continued to be manufactured and sold to anyone who at that time was willing to pay the small tax. It had become small over the passage of 60 -- 52 years, I suppose, and be able to acquire those. That is why the Firearm Owners Protection Act, which as its name suggests, was largely about shielding firearm owners from government action, did include this prohibition. And Congress saw no problem with doing this, because the only useful advantage that machineguns confer on a shooter is the rate of fire, and that's not really a useful self-defense feature, it's not really a useful hunting feature to be able to fire ammunition at the rate that a machinegun can do. And so that's why, when you look and you see that these devices are equivalent in their function, it confirms that it was not arbitrary and capricious for the department to adopt this definition.

Now, my friend across the aisle here described, I

think, well, the manner in which a bump stock equipped rifle fires. The key elements in the department's application of the definition to a bump stock are that it allows a shooter to set up essentially a self-regulating mechanism using his two hands and his shoulder, and the bump stock device, in previous arguments like that, a kind of air rifle thing, but there's really nowhere in my field of fire here where I wouldn't be aiming at one of the Court's personnel, so I'm going to refrain from doing that, your Honor. The shooter shoulders the rifle, places his trigger finger on the ledge that a bump stock device provides for this purpose, places the non-trigger hand somewhere else, usually it's on the barrel shroud or the foregrip of the rifle, and then applies continuous and appropriate level of forward pressure and rearward pressure. And within that zone of pressure and within the space or along the tube provided for the purpose by the bump stock device, the mechanism, the rifle reciprocates while the shooter's intent remains to pull the trigger. The existence of that space and the tube, and/or the tube, they limit the recoil-induced movement and help the shooter maintain this reciprocating effect within a narrow linear zone, and that is why the bump stock equipped rifle appears to fire no differently than a conventional machinegun. And it does so easily without all of the training requirements and experience requirements that are

necessary to achieve that result with unassisted bump firing.

Plaintiffs have several objections to this application. One, which you heard just a few minutes ago, is that this represents an expansion of the statutory definition, but it is not an expansion of the text of the statute. It's an expansion of the unnecessarily narrow way in which ATF had been interpreting the statute. ATF, subsequent to the Akins accelerator ruling, had judged the application of the statute to a device based on whether that device contained a spring. Why a spring? Because that's what they had seen before, that's what they were familiar with before. But nothing in the statutory text as the final rule explains, requires that there be a spring there.

Plaintiffs object, and I addressed this before, about the change from the trigger to the shooter as reflected in the change in language or the interpretation of function as pull. But pull is fundamentally a concept that's about the human action. What is the shooter doing? In our brief, I think we used the example of pulling in the line on a boat as a kind of continuous motion that one would do, and in -- and which might address the next of plaintiffs' concern, that someone's finger comes off the trigger in the course of doing this. But a pull of a rope illustrates just how one can engage in a single continuous

motion with one's hands that does not require continuous contact or pressure.

And plaintiffs make much in their reply brief out of the distinction in definitions between harness and channel, but it's not actually as great a difference as they would suggest. It is true that the rule only uses channel, and we have argued this in terms of harnessing, but the two definitions they supplied make clear that these are really similar and related concepts, that channeling energy is to direct toward or into some particular course; and harness is to gain control over for a particular end. These are both identical concepts essentially in application to the bump stock where the very purpose of a bump stock. And no one disputes this, there can be no other purpose to a bump stock is to assist the shooter in making a bump stock function as a machinegun, function automatically so that any person who affixes one to their semi-automatic rifle can achieve the automatic firing cycle that is described in the final rule.

I would like to also address a couple of additional points that plaintiff raised in this presentation. At one point, he discussed something labeled as 706 deference, and suggested that because the department is not relying on Chevron deference here, that somehow APA 7062 and its arbitrary and capricious standard does not apply, but that's not correct, your Honor. This case is before the Court on

application of the Administrative Procedure Act. Plaintiffs' claim is necessarily that the agency violated that standard, the standard set forth in 7062 against arbitrary and capricious, or the other components thereof in its behavior. And so the statutory standards that Congress has promulgated for review and that degree of statutory deference, that means, and I think plaintiffs' counsel used this term, that means the agency is entitled to adopt any definition that has the power to persuade. That does apply here, your Honor, regardless of whether Chevron deference applies or not. There is not a special -- there is not a -- there is not an agency assumption separate from Congress.

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THE COURT: Was that the position you took before Judge Friedrich?

MR. SOSKIN: Yes, your Honor. Before Judge Friedrich, the government did not assert that it was entitled to Chevron deference, and I believe we cited the same language from Apel or Apple, in that case that we cited here, your Honor.

THE COURT: Her opinion, though, uses Chevron deference, correct?

MR. SOSKIN: Yes, your Honor. And Judge Friedrich is correct, we think, in the application of -- the application of principles to reach the conclusion that the final rule was proper. She's correct as to ambiguity in her

opinion, but in our view, whereas here we are interpreting a criminal statute, the agency's interpretation must be persuasive, not just permissible.

THE COURT: So under no uncertain terms, you're walking away from Chevron deference on this case?

MR. SOSKIN: Yes, your Honor. The Supreme Court has warned us in the language that plaintiffs' counsel presented, and this is not a case where what we are doing, as plaintiffs' counsel highlighted, is telling a half million owners of bump stocks, that notwithstanding the letters that they have in their possession that say these are not regulated by the National Firearms Act, these are not machineguns, they are now machineguns. The Court needs to be persuaded that that position is correct and not simply defer to it as one permissible interpretation among many.

THE COURT: Sounds to me like the department is counting votes on the issue of Chevron deference moving forward. I mean I'm -- that was cryptic, but I mean there is a real issue now, is there not, whether there are five votes for Chevron deference in the Supreme Court?

MR. SOSKIN: You're right, your Honor. And you know, I point you -- Justice Gorsuch wrote about this issue just this week.

THE COURT: Indeed.

MR. SOSKIN: I guess you may be familiar with the

BNSF Railway opinion. What he highlighted is that in that opinion, much like here, the parties were not asserting that their positions were correct primarily as a result of deference. I think he noted that when they appeared before the Supreme Court, counsel for BNSF was almost apologetic about asserting to Chevron.

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THE COURT: I think there is some description that it was in the last ten seconds of the argument that there was a fleeting reference to Chevron and the attorney nearly apologized for referencing it?

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MR. SOSKIN: That's right, your Honor. But you know, that was in a civil case entirely devoid of the criminal overlay here. The Supreme Court has not accorded us deference in the past to interpretations of criminal statutes. And so layering on, you know, various justices' statements about Chevron deference to try to, for the first time, obtain deference to an interpretation of a criminal statute here, you know, that wouldn't make a lot of sense.

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But importantly, your Honor, there is another issue here. The final rule makes clear that the department doesn't need deference to prevail in this case. The final rule expresses the department's view that this is the best interpretation of the statute. And deference is a heck of a lot more important when there are two equally good readings of the statute, or perhaps when the reading the agency is

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urging is the least good of multiple readings of the statute. But here the final rule is premised on this being the best interpretation of the statute. So there is no particular reason for us to wade into the judicial murkiness of Chevron deference.

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THE COURT: Okay. So that is the best interpretation in 2019. There was a previous best interpretation a decade before, correct?

MR. SOSKIN: You're right, your Honor. Prior to 2006, the department -- the agency had not confronted, I suppose it was prior to 2002 when they first saw an Akins accelerated, but not really confronted this issue of a device specially designed and crafted to accomplish this purpose of converting a semi-automatic into a machinegun by operating in this way, harnessing the recoil energy such as this. There had been, I think, some issues with rubber bands in the past, which also left the agency somewhat unclear how to approach it, but you know, one doesn't go out to sell rubber bands for the purpose of converting -- converting firearms into machineguns, converting semi-automatic rifles into machineguns, which are firearms since the statutory definition of firearm is not what we always refer to. But, and I should note that, as to the rubber band issue, plaintiffs' counsel pointed to 66551 in the final rule. But at 66533 is the department's real

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understanding of why a rubber band is not a machinegun, and that is, as I just mentioned, that it is not specifically designed for this purpose. That is why a box of rubber bands and a closet full of semi-automatic rifles is not an arsenal of machineguns. There might, in fact -- It might, in fact, be that confronted with an appropriate case of a device designed to, you know, specially attach rubber bands to a semi-automatic that the conclusion might be a little different, but 66533 emphasizes the specifically designed nature of bump stock devices.

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Two final points, if your Honor has no further questions for me right now. One issue is the one that plaintiffs' counsel raised about whether this definition turns semi-automatics or risks turning semi-automatic rifles into machineguns. And we addressed this in our brief, but I would like to highlight this again. There would be a couple of problems with the department taking that position in the future. One is that Congress has also promulgated a definition of semi-automatic rifle. And so principles of statutory interpretation would suggest that Congress did not intend that to be subsumed within the definition of machinegun, or it would not have supplied a separate definition of semi-automatic rifle. We also highlighted in our brief that, although plaintiffs have not argued this case from Second Amendment principles, we think it's likely

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that any challenge to an interpretation that converted, you know, commonly available self-defense rifles that a plurality of American households possess into unlawful machineguns would almost certainly have to be evaluated in terms of Heller's understanding of the preexisting Second Amendment right to prevent the banning of such weapons.

And the second item I would note, one of your questions to plaintiffs' counsel presupposed that ATF has been consistent on single pull since 2006, and I would hesitate to use the word "consistent," your Honor. I think that following Ruling 2006-2, as some of the individual letters that appear in plaintiffs' exhibits illustrate, there was not sufficient clarity within ATF of how the definition of machinegun was to be understood to do so consistently. And so the rationals in those opinions -- in those opinion letters are not all consistent with each other. One reason for adopting the final rule, which as I note is the best interpretation of machinegun, is to ensure that within the government there is that consistency as well as a consistency in its presentation to the public.

If you have no further questions. Thank you.

THE COURT: Thank you.

Go ahead, Mr. Olson.

Then I'll call on Mr. Glover.

MR. OLSON: Thank you, your Honor.

There is a lot there to unpack. I'm going to try to do my best, if you bear with me.

One of the things I wanted to hit on right away was counsel's contention that rubber bands would not be machineguns because they are not designed and intended to be used to construct a machinegun. That was the same point made at oral argument in DC, and Judge Friedrich jumped all over that. That's because the statute does not just outlaw things that are designed and intended. The last section of the statute says, "any combination of parts from which a machinegun can be assembled." And Judge Friedrich said why wouldn't it fall under this? And I think it clearly would, your Honor.

Congress used the term "designed and intended" three other times in that statute and didn't use it in that last section, and there is a reason for that. And the Supreme Court has explained, "Where Congress includes particular language in one section of the statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. That's King vs. United States, 1993.

And ATF, for a number of years, has had this -- it's known as constructive intent, I guess is what it's called. That if you have a certain set of objects in a setup so that they are -- and I'll read it the way they say

it, "Placed in close proximity in such a way that they serve no useful purpose other than to make a prohibited item, that that would be a machinegun." So this idea that because a rubber band wasn't marketed that way or intended, obviously
10:07:50 no one is saying a rubber band in a desk drawer is a machinegun, but if someone were to construct a device, I think ATF would have a hard time trying to figure out what that is, but the final rule obviously says this is fine, we put our stamp on that.

10:08:12 One of the things I want to circle back to is counsel's contention that a bump stock permits a person to shoot faster than without one. Obviously, the government has admitted that bump fire -- the technique of bump firing can be accomplished with or without a bump stock. In one of
10:08:31 our footnotes in our brief, we have a video of someone bump firing a rifle with a bump stock and a video of someone bump firing a rifle without a bump stock. I haven't tested it to see, but when you just listen to it, the rate of fire is identical between the two. Obviously Congress didn't create
10:08:52 a rate of fire.

One of the other things that Mr. Soskin alluded to was that there is great similarity between bump stocks and machineguns, and no one is disputing that someone who goes to a range and listens to a bump stock and listens to a
10:09:07 machinegun would think that these are similar things. One

of the words the government has used in the past is "mimic." It mimics a machinegun. As we pointed out, just because it looks like something doesn't mean that it is something, and that's sort of where they are going there.

10:09:23 One of the other points that was raised was Congress clearly intended that this sort of rapid fire would be banned when it enacted the NFA. That may be so, that might be true, but that's a problem, as we pointed out, for Congress to solve, because bump stocks were designed, we

10:09:44 admit, to get around the statute the way it's written. And ATF agreed for a decade and a half that they were successful. There's other things. There is a, they call it a wrist brace for people who are disabled, that they can wrap around their wrist and shoot a pistol version of an

10:10:03 AR-15 or an AK-47. It looks an awful lot like a stock, your Honor. People use it as a stock, and it sort of gets around the short-barreled rifle, short barreled shotgun prohibition. ATF has said that these things are perfectly fine to own. So there are other things that get around

10:10:20 other statutes, and ATF has said you're right, under the statute the way it's written, Congress didn't cover this device. And the same thing is true here. This was specifically designed to not have the characteristics in the statute that Congress prohibited.

10:10:37 The other thing Mr. Soskin raised was that these

things are automatic in that they do something to bump fire that make it flawless and perfectible and that it doesn't require technique or practice or anything. I actually had the opportunity a couple days ago to test fire a bump stock, and started out trying to just bump fire a rifle, and at first, it was just one round and one round and then two rounds, and it took a quite a bit of practice, and I think the most I was able to get was like a four-round string of shots. That was it. So it certainly requires a lot of practice and a skill level. There are people who do it very well. But then we went and moved on to the bump stocks and we tried to do that. And I wasn't much more successful. I think we got seven rounds in a string.

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In Staples, one of the things that the Court talks about is that a machinegun continues to fire until the trigger is released, or the ammunition supply is exhausted. Well, we couldn't exhaust the ammunition supply. We were trying. I would have liked to fire all 30 rounds with a single burst of rapid fire, but I was unable to accomplish that. So this idea that a bump stock takes away the human input or takes away the need for technique and practice and all of those things is demonstrably wrong, your Honor.

One of the other things counsel raised is that they admit that the input on a bump stock, the forward pressure, Mr. Soskin mentioned a person uses his shoulder, uses his

hands, uses the bump stock, all of those things in combination. The argument is that they are still automatic enough -- and this was one of the things Judge Friedrich talked about, and did not have good push back from opposing counsel, from plaintiff's counsel on that, but as we have argued, this is not a question of degree, this is not how much input the Court thinks is enough before it becomes -- and still constitute automatically. The statute is very clear. The statute says automatically by a single function of the trigger, not automatically by a single function of the trigger and forward input and rearward pressure and all of these other things which government counsel has admitted transpired. It's just automatically by a single function of the trigger. If you have to do more to a weapon system to get it to bump fire, that is too much under the statute, according to Congress.

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One of the other concepts raised was that there is a continuous pressure or constant pressure on a bump stock. And from my experience, that is also not the case, because there is a razor edge of how much pressure you can apply to a bump stock pushing it forward to where you will cause it to stop cycling in bump fire mode. You have to be right on that, and it's that between each and every shot, and you absorb recoil and then you have to apply that pressure. And once you get it wrong once, the weapon stops firing, the

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trigger will go dead, you will have an ammunition jam, something like that. So it's not continuous pressure. That's the idea that they raise, that it's automatic, the pressure, that it's just once you dial in your wrist to whatever the appropriate pressure is and push forward, everything else just works smoothly, and it's not that way at all. There is really nothing different about a bump stock and any of the other forms of bump fire other than a bump stock makes it a little easier. And I finally figured out why it makes it easier to bump fire with a bump stock than without, and it's because if you're bump firing with a belt loop, you actually have to, you hook your thumb through the trigger guard and through the belt loop, and that belt loop provides you a fixed position to hold your finger so that you can then pull the firearm into it. If you fire from the shoulder with a bump stock, you have to maintain that trigger finger in three-dimensional space while the gun is recoiling and the muzzle is rising, and all of these things are happening to you. It is very difficult to maintain that fixed point in space to allow bump fire.

With a bump stock, though, it provides that trigger ledge on the stock, it provides that place that you can put pressure into your shoulder, on the stock, and grip the hand guard, and this becomes like a very triangular, fixed, stable position to then pull the rifle -- I'm sorry, push

the rifle forward into the trigger. And that is, I think, the only difference between a bump stock and any other sort of bump fire is that it provides that platform for the stability of your trigger finger.

10:15:23 Government counsel has admitted that Chevron deference is inappropriate here, but then argued that Section 706, arbitrary and capricious deference, which the Eleventh Circuit has called deference, is appropriate. But as Judge Friedrich and numerous other courts have explained, 10:15:40 they are exactly the same analysis. And if they don't get Chevron deference, I don't see how they get the same deference under Section 706.

You had asked government counsel --

THE COURT: Is there any Sixth Circuit law on the 10:15:59 equivalence of 706 deference and Chevron deference that you're aware of?

MR. OLSON: Your Honor, I haven't done an exhaustive search, but I haven't found anything. I mean Apel and Abramski were 2014. I don't know that there's been 10:16:14 a whole lot that's happened since then on this front. I certainly haven't found anything.

THE COURT: Okay. Thank you.

MR. OLSON: The government -- You had asked government counsel about a single function becoming single 10:16:26 pull in 2006, 2008, and now becoming single pull on

analogous motions and all that goes with it. As we pointed out in our reply brief, this is a word that encompasses all of the different ways a trigger can be activated, and that word is function. I think it is so clear that Congress intended -- Mr. Soskin said that pull is the colloquial meaning of function, but pull is not in the statute. It would have been easy for Congress to use the term "pull." They chose to use the word "function," and why is that? Why didn't they use the colloquial term that everyone would understand? I think the question answers itself.

Mr. Soskin noted that the Supreme Court in Staples, I believe it was Justice Thomas in his footnote, used the term "single pull." I would chalk that up to not having a good editor and not being careful and just sort of falling into that trap of speaking colloquially. It wasn't an issue in the case, it wasn't briefed or argued.

THE COURT: I can't assume that, can I?

MR. OLSON: Well, it certainly is dicta, your Honor. It wasn't necessary to the outcome of the case.

THE COURT: I'm not at all sure that a district judge in the Western District of Michigan can engraft that sort of intention on, or lack of intention on Justice Thomas.

MR. OLSON: Fair enough. I would say that I don't think it's -- that that is any sort of binding authority

that forecloses any of the arguments that are being made here that single pull and single function are not the same thing.

THE COURT: Is your definition of function intention at all with the definition of trigger?

MR. OLSON: The definition --

THE COURT: Trigger is the mechanism used to initiate a firing sequence, according to the Fleischli case.

MR. OLSON: No. I don't think it's intention at all, because that still has a trigger mechanical centric focus of how the firearm is operating mechanically. What the government wants to do is go and look at how the shooter is interacting with the weapon. Single pull, single push, pressure, all of these concepts are undefined, and they are trying to define them now. But it's not in the statute. Congress didn't discuss them. This was not discussed in 1934, and I guess I'll --

THE COURT: The commencement of a firing sequence could result in multiple shots being fired, correct?

MR. OLSON: Multiple shots semi-automatically being fired in rapid succession.

THE COURT: The initiation of the firing sequence, which is the first function or the tension on the trigger, right?

MR. OLSON: It's not actually tension on the

trigger. It's just keeping your finger on that extension ledge on the bump stock. The trigger is activated by forward pressure of the firearm by the support hand, not by any rearward tugging or pulling or drawing or anything like that, your Honor.

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THE COURT: So but if you know how to use the device, you are going to get multiple shots, right?

MR. OLSON: You will get multiple semi-automatic shots quickly, which is -- it's exactly the same as if you use your belt loop to do it. It's multiple shots quickly. Each time a shot is being discharged, the trigger is breaking to the rear and resetting to the front. It's functioning one time. And that is the same with all sorts of bump fire and has nothing to do with a bump stock.

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Counsel, once again talked about automatically and the bump stock as being -- as there would be a channeling of recoil energy to the rear and then back to the front. A bump stock, as we have pointed out, doesn't do that. I mean, recoil energy, when you fire a round that way, recoil goes this way. And when you push the firearm back forward, it's going that way. Bump stock doesn't change any of this. There actually are firearms which do have mechanisms that are self-acting, self-regulating harness recoil energy that will change the direction of recoil. There's a firearm called the Chris Vector, I think it's a pistol and a rifle,

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but the recoil starts to the rear, and there is a mechanism which then transitions the recoil downward so that you have less felt recoil and less muzzle rise, and that's not what's happening here. There is nothing in a bump stock that channels energy in some direction. It's already going backwards, it's already going forwards, and the bump stock certainly doesn't change that at all.

The government counsel discussed how they have transitioned from harnessing recoil energy to then saying well, we admit it doesn't actually harness recoil energy, it helps the shooter harness recoil energy. Well, that's not what the regulation says. The regulation says harnesses. And then they move to this idea of channeling recoil energy, and Mr. Soskin says that's basically the same thing. I think it's entirely different than harnessing, your Honor. The analogy we used is a ditch channels water while it just guides it in a particular path, while a damn will harness water, it will store it up, it will have a capacity of energy then to be used. And that's, when you look at bump stocks, even if a bump stock channeled energy, that's not the language they used. That's not the test they've set up. It has to harness energy. And as they've admitted, there's nothing in a bump stock that does that. If you take a rifle with a bump stock on it and tilt the rifle forward, the bump stock will just slide forward. If you tilt it backwards,

the bump stock slides backwards. There's no -- one of the other concepts they use is there is space created by the bump stock. But it's not created by the bump stock, your Honor, it's created by the shooter applying forward pressure moving that rifle away from his body to then give it a place to recoil. It's the same as if you have it on belt loop, there's empty space behind you, or if you're firing from the shoulder, you have to hold it away from your shoulder so it can recoil, and a bump stock doesn't create that space. A bump stock can't be fired with one hand.

If you take a machinegun out, a two year old could pull the trigger, because all you have to do is articulate the trigger once, hold it to the rear and the gun will continue to fire, that hammer will continue to go forward and fire additional rounds. If you try the same thing with a bump stock and just rested it on a table and pulled the trigger once, it's going to fire one round. And that's it. It requires that added human input of variable pressure between each shot to keep that sequence going. And that, as we argued, is more than the statute permits.

I think that's all I have at the moment, your Honor.

THE COURT: All right. Thank you.

Mr. Soskin, do you want to weigh in as a result of rebuttal argument? Go ahead, sir.

MR. SOSKIN: Just one thing, your Honor. And that's some two year old who can fire a machinegun and keep control of it.

Your Honor, we also --

10:23:36 THE COURT: There was a little bit of hyperbole there, Mr. Soskin, and I recognized it as such.

Go ahead.

MR. SOSKIN: Your Honor, we also looked for a Sixth Circuit case to which we could point to on the appropriate

10:23:52 standard here where Chevron deference is lacking, and we don't have one to cite to you, but we can give you two out-of-circuit Court of Appeals cases to look at. I can't recall if they are cited in our brief here or not, so I want to highlight them for you. One is Sierra Club vs. Army

10:24:10 Corps of Engineers, it's from the Fourth Circuit last year. The cite on that is 909 F.3d 635. And it runs through whether Chevron deference is applicable, whether Skidmore deference is applicable. And then if neither is applicable, there's also a DC circuit case, In Re: Polar Bear

10:24:39 Endangered Species Listing, and the cite for that is 709 F.3d 1, it's from 2013. And it explains that an agency interpretation not entitled to Chevron deference gets only its power to persuade, which of course is the standard

10:24:56 sometimes labeled as Skidmore deference in which I think academics have tied themselves in knots trying to understand

whether the power to persuade involves deference or is just essentially the natural function of a brief.

So with those in mind, if you would like to hear from Mr. Glover on any of the other issues, I would turn things over to him.

THE COURT: Okay. Go ahead, Mr. Glover. Thank you.

MR. GLOVER: Thank you, your Honor. And I want to echo Mr. Soskin's sentiment, we are thankful the Court invited us here, and really appreciate the U.S. Attorney's Office and their support.

I would just like to touch on a couple points, and one, Mr. Soskin closed with in his initial argument, which was that ATF may not have been consistent since the Akins accelerator. But as the Court knows, an agency is allowed to change positions in what's called often a State Farm or a swerve case so long as the agency supplies reasoned decision making. And the Sixth Circuit has recognized, and we cited this Metropolitan Hospital case in our brief, that the understanding of a safety issue is one reason an agency might change position. Here, the final rule provides such reason to decision making and provides a straight forward reason that they looked again at the definitions of single function of the trigger, it automatically and reversed prior ATF classifications. You know, the rule states that it was,

"enacted pursuant" -- My apologies. My apologies. The rule states that, "It was enacted to provide the best definition of those terms and to clarify these undefined terms."

10:26:34 Opposing counsel suggested that the rule making was, I guess, predetermined or had a political directive to reach this outcome. But again, the final rule states that it's trying to provide the best definition, it's trying to, based on additional experience, look at these terms and 10:26:51 provide a definition for automatically in forced single function of the trigger. The President's directive was to follow the law. He said he was still adhering to the rule of law. And we cited in our brief FCC vs. Fox in which the Supreme Court majority rebutted Justice Breyer, who was in 10:27:09 dissent, suggesting that for the FCC, an independent commission, political branches like Congress and the President shouldn't be influencing their decision making. And here, you know, you also have comments from members of Congress, etcetera, suggesting why don't you look at this 10:27:22 again, and we don't have an independent agency, we have a core executive branch agency, the Department of Justice. So we think there is nothing wrong with considering public experience and considering, you know, the request of the President and the request of members of Congress to look at 10:27:37 this.

I'd next like to, I guess, talk briefly about the balance of the equities. I know opposing counsel didn't raise that. So if the Court is happy with the briefing on that, I don't need to go into great detail. But we have a footnote in our brief, I believe it's at Page 11 citing the Great Lakes Brewing case from the Sixth Circuit discussing the Winter factors. And our position continues to be that while the Sixth Circuit said that as long as there is a likelihood of success on the merits, the factors should be balanced, and they are not tallied. That requires a significant showing of likelihood of success on the merits, not just merely the possibility of success on the merits. And our position continues to be that the Winter factor, you know, reading Winter, the Court seems to suggest you need a significant showing on every single one of these factors.

As we made clear in our brief, we concede that they have shown irreparable harm. But as to the last two factors, the balance of the equities and the public interest, these merge when the government is a defendant. And the government has put forward, I guess, three main rationals for this rule. First, public safety; the second being the safety of law enforcement; and the third, carrying out Congress' intent in the National Firearms Act and the Gun Control Act in banning machineguns and weapons that fire at a high rate.

They have suggested that the balance of the equities tips in their favor and the public interest tips in their favor because there's an interest in requiring the Department of Justice and ATF to adhere to the language of the statute, but that merely presumes that they are correct about the underlying merits of the statute, and any APA challenge or, I guess, any -- let me back up -- any preliminary injunction alleging an agency has exceeded statutory authority would have that same argument. I'm not aware of the Sixth Circuit saying you automatically win on these factors merely because you've alleged that the government has exceeded their statutory authority.

I'm happy to address the factors otherwise, but we would also be happy to rest on our brief. I appreciate the Court has been very generous with your time.

THE COURT: Well, let me hear from Mr. Olson on the subject, and I may call on you again.

Go ahead, Mr. Olson.

MR. OLSON: Your Honor, one of the interesting things here is that the government says they, we presume we are correct that the statute needs to be interpreted the way Congress wrote it. But their counter argument is that, as counsel just stated it, to carry out Congress' intent. And that has time and again been what ATF claims it's trying to do in this case is carry out Congressional intent rather

than the law. They are trying to expand the statute to cover devices that were never covered by Congress because they think that's what Congress would have wanted them to do. That is not a legitimate government interest here.

10:30:48 As for public safety, law enforcement safety, we have pointed out we have discovery issues pending with the government about looking at the Las Vegas firearms and their reports on that. The FBI has never released any detailed report about the firearms which ones were used, which ones

10:31:09 weren't used, whether some of them were actual machineguns, had machinegun parts, had auto sears, binary triggers, all of these things that can make a firearm function rapidly. ATF, once or twice in their briefing, has suggested that these rifles with bump stocks were used in the Las Vegas

10:31:28 shooting. We can't find any government source to confirm that. Judge Friedrich even in her opinion was very careful to say ATF claims they were used, but we have had three or four informal confirmations that ATF never has got to examine these firearms. They have never done a ballistics

10:31:47 test to see which ones were fired, which ones match up with bullets that were recovered, whether any had been cleaned, were unfired, whether the bump stocks were in fixed positions so they would only function semi-automatically. And the only thing ATF has ever done that we can tell with

10:32:05 these rifles is they had one agent who was allowed in the

room when the FBI was there doing their initial examination, and they said you can't touch them, you can't break them apart, you can't look at them, you can take a picture of them, and that's it. So they took a picture, and they have -- they actually came up with a report. I think they felt they were obligated, but the report doesn't say anything. It says -- it uses the term "appears to be" like 15 times. It says, "this appears to be an AR-15 with what appears to be bump stock on it." Nothing else, because they have never examined these things, yet they claim that they're protecting public safety, and there is zero evidence -- I'm not saying it's not true, I'm just saying it is an unproven assertion that these things were used in Las Vegas and that there's any public safety risk. There's never been any allegation that bump stocks have ever been used in any crime anywhere in the country. There is actually two pending FOIA requests in DC from plaintiffs' counsel in some of the other bump stock cases seeking that information, and ATF has not turned over anything, and neither has the FBI to indicate that there's ever been a crime committed with one of these.

And as we pointed out, a rubber band is actually far more effective at bump firing at -- in rapid trigger manipulation than a bump stock is. And there's, you know, you can fire from the hip, you can fire a whole host of other ways. You can get a binary trigger, or if you're

Stephen Paddock, you can buy a legal machinegun. The guy was reportedly a millionaire and had nothing on his record, so there's nothing that would have stopped him from doing what he did if these things had been banned, and there is no
10:33:43 evidence that they have ever been a threat to anyone in any other context. So I think the public safety, law enforcement safety rationale there, your Honor, is very thin.

On the other hand, you have a half million
10:33:58 Americans who own these things, have relied on ATF, have spent their hard earned money to acquire these things, and as is unfortunately far too common with ATF, they later come in and say oops, we were just kidding. Now everybody get rid of them. And I think that certainly weighs in the
10:34:18 balance of the equities in plaintiffs' favor to at least stop this thing until a decision on the merits can be reached.

Thank you. That's all I have.

THE COURT: Thank you.

10:34:28 Mr. Glover, go ahead.

MR. GLOVER: Just briefly.

As to my friend on the other side's discussion of the Las Vegas shooting, the issue is whether ATF, which stated in the rule, they were looking at public safety and
10:34:42 concerned about public safety is furthering the public

safety, and so there may not have been a number of violent acts committed with bump stocks, but ATF, in its expertise, thinks that these are dangerous. One of the things they do, as Mr. Soskin explained in his opening, is allow an average person to shoot at a high rate of speed.

10:34:58

Now opposing counsel, I think, has experience with these, and provided some context on that, but that sort of ability to shoot a high rate of speed allows you to put down suppressive fire, if you were faced with law enforcement, and so again, ATF is focused on public safety. They are focused on protecting law enforcement personnel.

10:35:11

Opposing counsel also, I think, pointed out or complained that the rubber band would be more effective, or you might be able to buy a legal machinegun, but just because there are other ways to, you know, assert public safety or other ways to prevent this sort of rapid fire doesn't mean that the final rule isn't focused on it and trying to promote public safety.

10:35:28

I'd just like to close by -- or unless the Court has further questions -- clarifying a point that Mr. Soskin or an exchange that you had with Mr. Soskin related to Chevron.

10:35:43

My apologies, my notes are all a mess.

THE COURT: That's all right. Take your time.

MR. GLOVER: You asked Mr. Soskin if we were

10:35:58

relying on Chevron here, and he agreed that we were not relying on Chevron. And I think your phrasing was that the department seemed to be counting votes on Chevron. I just wanted to clarify that the solicitor general has to set the
10:36:14 department's policy as to Chevron, and I believe there is a pending Supreme Court case related to our deference, which is not directly Chevron, but it may be a species a little even more differential, I believe it's called Wilke vs. Department of Veterans Affairs, so the solicitor general's
10:36:29 brief there would be the best place to look for the department's current thinking on Chevron.

THE COURT: Justice Gorsuch's opinion in the railroad case was, you know, kind of broke new ground, I think.

10:36:42 MR. GLOVER: Absolutely understandable. I didn't want Mr. Soskin or I to be quoted outside of the court as if we had changed the department's position or purported to put it forth.

THE COURT: I understand the solicitor general
10:36:54 makes those calls.

MR. GLOVER: Thank you, your Honor.

THE COURT: Thank you.

Mr. Olson, anything further?

MR. OLSON: Nothing further, your Honor.

10:37:00 THE COURT: All right. Thank you.

Well, thank you for your presentations here today, and I'll get an opinion out as quick as I can. I know we are up against a late March date, so we will do the best we can to get it out.

10:37:16 Thank you.

COURT CLERK: All rise, please.

Court is in recess.

(At 10:37 a.m. proceedings concluded.)

C E R T I F I C A T E

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/

Kathleen S. Thomas, CSR-1300, RPR
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